

Before the
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35316

**ALLIED ERECTING AND DISMANTLING, INC. AND
ALLIED INDUSTRIAL DEVELOPMENT CORPORATION -
PETITION FOR DECLARATORY ORDER**

**REPLY OF RESPONDENTS
TO SUPPLEMENTAL PETITION**

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A. Procedural Background

On November 2, 2009, Petitioners Allied Erecting and Dismantling, Inc. and Allied Industrial Development Corporation (collectively, "Allied") filed a Petition for Declaratory Order (the "Petition"), based on the order (the "State Court Order") of Magistrate Dennis Sarisky of the Court of Common Pleas of Mahoning County, Ohio in Civil Action No. 2006-cv-00181 (the "State Court Action") referring certain questions to the Board for resolution. The questions referred to the Board relate to the scope of the rights of certain of the railroad Respondents to use easements across property of Allied. On November 23, 2009, Respondents filed a Reply to the Petition agreeing to the institution of a declaratory order proceeding, and setting forth a proposed procedural schedule. Allied has now filed a "Supplemental Petition" proposing a new schedule and making new arguments with respect to the issues presented and the need for discovery. Respondents file this Reply to Supplemental Petition to address these new issues.¹

¹ If the Board accepts Allied's filing as a "Supplemental Petition" as submitted (as opposed to an impermissible reply to a reply) – see Supplemental Petition, p.2 n.1 – then the Board should likewise accept this reply to the supplemental petition. (A party may file a reply to any pleading unless otherwise provided. 49 CFR 1104.13.) In any event, if the Board accepts Allied's filing, it should also accept this filing so that it will have a complete record before issuing any schedule.

B. Issues to Be Addressed

The specific questions referred to the Board as set forth in the State Court Order are:

- (a) Do the issues regarding [Respondents] stopping or storing cars on the rail lines in question, in alleged violation of the easement agreements, fall within the jurisdiction of the STB?
- (b) Do the easements in question allow the [Respondents] to store or stage rail cars on the lines covered by those easements?
- (c) If the [Respondents] have violated the easement agreements what damages are available to [Allied]?

See Petition, Exhibit C. As Respondents view these questions, each is jurisdictional in nature:

Issue (a) would require an initial determination/confirmation that Respondent railroads are carriers subject to the jurisdiction of the Board with respect to the rail lines in question, and that the rail lines were operated by Respondents, at all times relevant to the State Court Complaint, as "lines of railroad." Thereafter, the Board will need to determine if stopping and storing cars is part of transportation under the ICC Termination Act ("ICCTA") and whether any easement agreement can permissibly restrict the use of the rail lines for transportation.

Issue (b), in a jurisdictional sense, would require the Board to review the easement agreements to determine if the easement agreements at issue in this proceeding would restrict the use of the rail lines, and if so, whether such restrictions are permissible restrictions on MVRV or its common carrier obligations.

Issue (c) would require the Board, if it determines that the easement agreements can restrict the use of the rail lines, to advise what types of damages under state law claims are

available under ICCTA. (ICCTA generally provides that remedies, including damages, under state laws are preempted. 49 USC 10501(b).)²

As noted previously, Respondents do not believe that the Board's proceeding should look at the questions raised by Allied which are beyond the scope of the questions referred by the State Court. These additional questions are set forth in paragraphs 34 and 35 of the Petition, and restated in the Petition's prayer for relief, items 4 and 5.³ With respect to item 4 – the relevant question is not whether Respondents have any current rights to use the rail lines described in the LTV or P&LE Easements, but rather whether they had such rights at such times as the State Court Complaint alleges the easements were violated. This question will, to the extent relevant, be covered under Issue (a) in the Referral Order. To the extent that Allied is seeking a determination that the LTV Easement has been terminated under state law principles of "merger by deed" or otherwise (Petition, ¶35), Respondents do not believe that the Board need or should address such issues. Pursuant to 49 USC 10903, it is clear that only the Board can authorize abandonment or discontinuance of operating rights, and that operating rights cannot be terminated under such state law principles. Additionally, since Allied's acquisition of the adjoining parcels is being challenged by Respondents in a separate federal court action (in which Allied seeks to eject Respondents from the adjoining parcels), it is premature for the Board to make any such determinations based on the acquisition of such parcels by Allied. Certain issues related to the rail lines on the adjacent parcels may yet come before the Board on referral from

² Respondents do not read the Referral Order as asking the Board to actually calculate what damages have been suffered, it is determined that the easement agreements may limit the use of the rail lines and that ultimately that Respondents have violated the easement agreement.

³ Allied's prayer for relief provides: "4) regarding whether Ohio Central, its successors and assigns presently have any operating or other property rights over the railroad tracks which are related to the P&LE Easement Agreement and the LTV Easement Agreement; and 5) establishing that the tracks which are subject to the LTV Easement Agreement are not main line tracks, but instead are spur, side, or industrial tracks."

the federal court action, but their resolution is not necessary for the resolution of the issues currently before the Board on referral from the State Court.

C. Bifurcation of Proceeding; Need for Discovery

Respondents do not object to a bi-furcated proceeding, although as noted above, they do not believe that there will need to be a proceeding to calculate damages, as they do not believe that the calculation of damages has been referred to the Board (as opposed to a determination of the types of damages that may or may not be available under state remedies which is an appropriate issue for referral). However, Respondents do not believe that additional discovery (or discovery at all) is necessary to resolve the legal issues involved in the “jurisdictional” questions the Board is being asked to resolve. Indeed, Allied’s proposed schedule (Supplemental Petition at 8) which references only briefs (and deletes Respondents’ references to opening and or reply statements), implies that the jurisdictional questions are legal, and not factual, in nature.

Allied, in part, claims it needs discovery because Respondents have not been forthcoming. As an example, Allied cites an affidavit of Terry Feichtenbiner, a former employee of Respondents, which it alleges is inconsistent with Respondents’ acknowledgement that its rights to use the P&LE Easement terminated as of December 1, 2006, when Youngstown & Southeastern Railway Company (“YSRR”) began to operate over the easement. However, an examination of the affidavit shows there is nothing erroneous in the affidavit. In fact, certain Respondents did acquire rights to use both the LTV Easement and the P&LE Easement, and at the time the State Court Action was commenced in January 2006 (and during the time covered by the Complaint in the State Court Action), those rights were current and effective. The use of both easements was in furtherance of interstate commerce. As of the date of the affidavit, the

LTV easement was still being used by Respondents in furtherance of interstate commerce.⁴ The question at issue is not what rights Respondents may or may not have to use the P&LE Easement today, but rather what rights they had during the time covered by the State Court Action when they were operating over the P&LE Easement and using it in interstate commerce for transportation purposes.

Allied lists a litany of issues that it argues need discovery (Supplemental Petition at 3-4); however, a number reflect legal issues, and others are not relevant to a determination of the issues that have been referred.⁵ Allied says it needs discovery to determine:

(1) whether Allied's claims would involve an unreasonable interference with interstate railroad operations. Such a determination may be involved if it is necessary to determine if Allied's claims or remedies would violate the Commerce Clause. It is not necessary if the determination is whether the claims are preempted by ICCTA, 49 USC 10501, or the Board's exclusive authority under 49 USC 10901 – 10903 over acquisitions and abandonments.

(2) the historical and current use of the railroad tracks at issue. The historical authority to operate the rail lines in question is a legal question that can be determined by review of prior ICC / STB decisions. The current use is not directly at issue as a change in use cannot change the character of a line of railroad. Further, all tracks operated by carriers are subject to the jurisdiction of the Board, although some actions with respect to spur or side tracks may not require prior Board authorization.

⁴ The P&LE Easement is also still being used in interstate commerce, albeit now by YSRR and not Respondents. It is because of its rights as the current holder of the P&LE Easement rights that it has filed to intervene in this proceeding.

⁵ It should be noted that Respondents also have outstanding discovery pending in the State Court Action, including depositions of Allied representatives, and a request for production of the Allied's expert report on damages which would likely generate other discovery. If Allied is permitted to pursue discovery in this proceeding, then Respondents may want to do the same.

(3) the customers or shippers served by the tracks. The identities of customers and shippers are irrelevant to the issues at hand.

(4) whether Respondents “need” to store or stage cars on these tracks. This is also irrelevant to the issues that were referred. The “jurisdictional” question is whether storage and staging of cars is part of “transportation” under ICCTA, and are permitted activities of carriers such as Respondents.

(5) whether the tracks are used in interstate commerce. The actual issue is whether the Respondent carriers were authorized to use the tracks for interstate commerce. All tracks operated are within the jurisdiction of the Board, although some actions with respect to spur or side tracks may not require prior Board authorization.

(6) the dates on which or frequency with which railcars were stored, parked or switched on the tracks. This data is irrelevant to the issues that were referred. They may be relevant, if at all, to the question of damages, if damages are determined to be available.

(7) the contents of the railcars stored, parked or switched. This data is irrelevant to the issues that were referred. They may be relevant, if at all, to the question of damages, if damages are determined to be available.

(8) whether the tracks involved are “mainline” or are simply spur, side or industrial tracks. This is not a factual inquiry for discovery. Initially, these questions may be resolved as a legal issue based on the authority that was obtained to operate over the lines. Additionally, all tracks operated are within the jurisdiction of the Board, although some actions with respect to spur or side tracks may not require prior Board authorization.

(9) the existence and source of any alleged common carrier obligations relied upon by Respondents. This is not a factual inquiry for discovery, but rather is a legal issue that can be researched by Allied's counsel.

(10) whether the tracks involved were designed to serve the defunct steel mills or allowed for other traffic. To the extent this is a factual question, it is not a relevant inquiry to the type or scope of authority Respondents had to operate over the easements. As noted above, this is a legal issue that can be researched by Allied's counsel.

(11) the existence of underlying property rights to operate over these tracks, including any claimed right to operate over the P&LE tracks prior to 2004. Respondents are not clear on what Allied may seek in this regard. However, the scope of the operating rights of the Respondents is a legal issue that can be researched by Allied's counsel.

(12) the corporate structure and "operator" status of any and all of the Respondents. It is not clear why the corporate structure is relevant to the questions that have been referred to the Board. However, the general corporate structure of the non-operating respondents Summit View, Inc. ("Summit View") and Genesee & Wyoming Inc. ("GWI"), as they relate to the carrier Respondents, can be found in prior filings at and decisions of the Board. The operating status of the carrier Respondents is a legal inquiry the answer to which can also be found in prior filings at and decisions of the Board.

(13) in the event the Easement Agreements are deemed ambiguous, evidence of the intent, understanding and customary meaning of the language used. While this may be relevant to the question of whether the Easement Agreements have been breached, this is not relevant to the jurisdictional issues to be determined by the Board.

(14) the damages incurred by Allied as a result of Respondents' alleged improper actions. If it is determined that Allied is permitted to seek damages, then this will be a relevant inquiry. However, it is primarily Respondents that will need discovery from Allied on this issue (Allied has not in the State Court Action produced any specific evidence of the damages it has suffered), and Allied should not need discovery from Respondents to determine what damages it has suffered.

Based on the foregoing discussion, Respondents propose that the discovery period be dropped (at least from the proposed initial jurisdictional proceeding) and that the following modified schedule be adopted for the initial proceeding:

- | | | |
|---------|---|--|
| Day 0 | - | Board institution of proceeding |
| Day 60 | - | Petitioners' brief on jurisdiction of Board due |
| Day 90 | - | Respondents' reply brief on jurisdiction of the Board due |
| Day 105 | - | Petitioner's rebuttal brief on jurisdiction of the Board due |

Depending on the findings of the Board in the initial jurisdictional proceeding, the secondary issues to be addressed and the scope of necessary discovery, if any, can be revisited.

D. Conclusion.

As set forth above and in the Reply to Petition filed previously, Respondents request that the Board (1) institute a declaratory order proceeding to respond to the questions referred by the State Court, (2) reject the additional questions raised by Allied that are beyond the scope of the

referral, (3) dismiss Summit View and GWI as parties to this proceeding, and (4) adopt the modified procedural schedule provided for herein.

Respectfully submitted,



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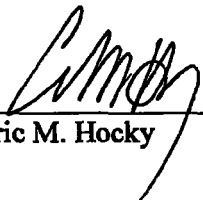
CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2009, a copy of the foregoing Reply of Respondents upon the following persons by US first class mail, postage prepaid, and by email:

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